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## A Silent Epidemic: Revisiting the 2013 Reauthorization of the Violence Against Women Act to Better Protect American Indian Native Women

Rory Flay

*Lewis and Clark Law School*

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## **A Silent Epidemic: Revisiting the 2013 Reauthorization of the Violence Against Women Act to Better Protect American Indian Native Women**

### **Cover Page Footnote**

Rory Flay is a recent graduate of Lewis and Clark Law School. Rory has focused on Native American law for the past four years. During law school, Rory worked for multiple Native American law-based firms and nonprofits, including DNA People's Legal Services, Haglund Kelley LLP, and the National Indian Child Welfare Association focusing on various areas from child welfare cases to developing evidence procedure for tribal police. Rory is a passionate advocate for social justice in tribal communities, particularly with issues of domestic violence and sexual assault. Currently, Rory works privately with tribal clients on various business-related matters in Portland, Oregon.

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REVISITING THE 2013 REAUTHORIZATION OF THE  
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AMERICAN INDIAN AND ALASKA NATIVE WOMEN

*Rory Flay*

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*Rory Flay*<sup>\*</sup>

I. THE STORY OF THREE WOMEN

I walked down the hall and thought, ‘Oh my God, it has to be me. It has to be my story.’ And that is how Deborah Parker came to tell her personal story of sexual assault to the world. A long-time activist in the fight to protect Native women, Parker had just visited the office of Sen. Patty Murray where she had been told that the Violence Against Women Reauthorization Act of 2012 (known as VAWA), which was on the Senate floor, would probably fail because it “lacked a face.”

‘Something in me just dropped. I felt injured,’ says Parker, who is an enrolled member of the Tulalip Tribes in Washington State and a tribal vice chair as of last March. Parker says that she couldn’t believe that the many letters from Native women that she had forwarded to Murray weren’t enough. The letters were ‘filled with the most horrific stories I had ever heard,’ explains Parker.

It was in the hallway outside of Murray’s office that Parker had a revelation: She realized that she had to set aside her fear and become ‘the face’ and the voice for the issue of Native women and rape. It was not an easy decision. Parker says that only the

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knowledge that more Native women would suffer and die could compel her to tell her story – actually three stories – that she had never told publicly before. Within minutes, Parker explained her revelation to Murray, prompting the senator to exclaim, ‘You’re it! You’re it!’ Murray scheduled a Senate press conference for the next morning. Parker was told that she was the first tribal leader to testify at such a gathering...

‘I am a Native American statistic,’ Parker told the Senate. ‘I am a survivor of sexual and physical violence.’ Parker then delivered a firsthand account of her own abuse and the importance of VAWA. She told how she was first raped in the 1970s as a toddler by a man who was never convicted. ‘I was as big as a sofa cushion, a two-and-a-half foot red velvet sofa cushion, which is where he raped me,’ she recounted.

The next story was of witnessing the rape of her aunt by four men who had followed her home to attack her. ‘I couldn’t help my auntie,’ she said, ‘I could only hear her cries.’ The third story told of the death of one of what Parker calls ‘my girls.’ The young woman died after being hung in a tree by her partner. The Senate passed VAWA 68-31 the next day.<sup>1</sup>

The 2013 Reauthorization of the Violence Against Women Act (VAWA) currently provides additional protections for one of the three women in this story, but not Parker or Parker’s aunt who were both raped by an individual who was not a significant other or someone with whom they shared a preexisting relationship.<sup>2</sup> Instead, because one of them was raped by an extended family member and the other by four strangers, they likely have no recourse

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<sup>1</sup> Jan Turner, *Stories of Pain and Perseverance: Rape on the Reservation*, WOMENETICS (July 24, 2012), <https://www.womenetics.com/Article/ArtMID/2681/ArticleID/2347/stories-of-pain-and-perseverance-rape-on-the-reservation>.

<sup>2</sup> The definitions of “dating violence” and “domestic violence” in VAWA do not contain protections for AI/AN (for explanation of acronym, *see infra* note 8) women attacked by non-AI/AN strangers. *See infra* note 20.

in tribal court<sup>3</sup> — leaving them at the mercy of the federal government for protection<sup>4</sup> — even after VAWA’s reauthorization in 2013.<sup>5</sup>

## II. INTRODUCTION

On the reservation, the incidents of sexual assault and rape have reached “epidemic” proportions in recent times.<sup>6</sup> Newer statistics shed light on what appears to be a rampant issue in Indian Country.<sup>7</sup> According to a report written by the Department of Justice in 2000, one in three American Indian or Alaska Native (AI/AN)<sup>8</sup> women

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<sup>3</sup> *Id.*

<sup>4</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

<sup>5</sup> See *infra* note 20.

<sup>6</sup> Sari Horwitz, *New law offers protection to abused Native American women*, THE WASH. POST (Feb. 8, 2014), [https://www.washingtonpost.com/world/national-security/new-law-offers-a-silver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb\\_story.html](https://www.washingtonpost.com/world/national-security/new-law-offers-a-silver-of-protection-to-abused-native-american-women/2014/02/08/0466d1ae-8f73-11e3-84e1-27626c5ef5fb_story.html) (“While the law has been praised by tribal leaders, native women and the administration as a significant first step, it still falls short of protecting all [AI/AN] women from the *epidemic* of violence they face on tribal lands.”) (emphasis added) [hereinafter Horwitz].

<sup>7</sup> Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, THE NEW YORK TIMES (May 22, 2012), [http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?\\_r=0](http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html?_r=0), (“One in three [AI/AN] women have been raped or have experienced an attempted rape, according [to] the Justice Department. Their rate of sexual assault is more than twice the national average. And no place, women’s advocates say, is more dangerous than Alaska’s isolated villages, where there are no roads in or out, and where people are further cut off by undependable telephone, electrical and Internet service... according to a survey by the Alaska Federation of Natives, the rate of sexual violence in rural villages like Emmonak is as much as 12 times the national rate. And interviews with Native American women here and across the nation’s tribal reservations suggest an even grimmer reality: They say few, if any, female relatives or close friends have escaped sexual violence.”).

<sup>8</sup> Sarah Kastelic, *American Indian/Alaska Native Children Exposed to Violence in Alaska – Part #1: An Overview of Alaska Native Children Exposed to Violence in the Home, the Community and the Juvenile Justice System*, NATIONAL INDIAN CHILD WELFARE (NICWA) (June 11, 2014), [http://www.nicwa.org/government/documents/NICWA%20Testimony%20Task%20Force%20on%20AIAN%20Children%20Exposed%20to%20Violence\\_June2014.pdf](http://www.nicwa.org/government/documents/NICWA%20Testimony%20Task%20Force%20on%20AIAN%20Children%20Exposed%20to%20Violence_June2014.pdf) (Showcasing preferred usage of American Indian or Alaska Native (AI/AN) when discussing these populations. This term is preferable because it is the most inclusive for tribal or Native people in the United States). See also Tina Norris & Nicholas A. Jones, *The American Indian or Alaskan Native Population: 2010*, U.S. CENSUS BUREAU, [https://www.census.gov/newsroom/releases/pdf/2012-01-25\\_aian\\_slides1.pdf](https://www.census.gov/newsroom/releases/pdf/2012-01-25_aian_slides1.pdf).

will be raped or sexually assaulted in their lifetimes, and AI/AN women are two and a half times more likely to experience rape or sexual assault than women of other races.<sup>9</sup> Furthermore, statistics show that the sexual violence<sup>10</sup> experienced by AI/AN women is most often committed by non-AI/AN men.<sup>11</sup> Current instances of sexual violence in Indian Country<sup>12</sup> showcase a legacy of colonialism that arguably did not exist prior to European contact.<sup>13</sup> Most women who experience sexual violence will find little to no legal recourse against their perpetrators.<sup>14</sup> Generally, incidents of

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<sup>9</sup> Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, U.S. Department of Justice, iv (November 2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>, (“Findings... show American Indians/Alaska Natives are at a greater risk of violent victimization than are other Americans. A recent study by the Bureau of Justice Statistics found that the rate of violent victimization for Native Americans was more than twice the rate for the Nation (124 versus 50 per 1,000 persons age 12 and older).”).

<sup>10</sup> See generally *Sexual Violence: Definitions*, CENTER FOR DISEASE CONTROL AND PREVENTION (Feb. 10, 2015), <http://www.cdc.gov/violenceprevention/sexualviolence/definitions.html>. For the purposes of this article, “sexual violence” is an umbrella term referring to any sexual abuse including rape, sexual assault, and child sexual abuse.

<sup>11</sup> Michelle Chen, *Indian Country Wins Power to Fight Sexual Assault*, COLORLINES, (Aug. 2, 2010, 9:30 AM), <http://www.colorlines.com/articles/indian-country-wins-power-fight-sexual-assault>.

<sup>12</sup> This article will use the 18 U.S.C. § 1151 (1949) definition of Indian Country because it is far more inclusive. Indian Country is a broad term that refers to a variety of lands including lands beyond just the title of “Indian reservation,” (pueblos, allotments, etc.) and “Indian Country Defined” 18 U.S.C. § 1151 (1949) (“‘Indian country,’ as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”).

<sup>13</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS, 3 (2010).

<sup>14</sup> Amnesty International, *Maze of Injustice: The failure to protect Indigenous women from sexual violence in the USA*, 62-71 (2010) <https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf> (dissecting why federal prosecutors decline to prosecute so many sexual violence cases – they will not take a case unless it is virtually guaranteed that the case will result in a conviction. Without physical evidence, an issue common in these cases, most claims are ignored by federal prosecutors. According to the 2003 report cited in the article, federal prosecutors declined 60.3 percent of all sexual violence cases reported to them).



rape committed in Indian Country are prosecuted by the federal government under the Major Crimes Act,<sup>15</sup> which prevents AI/AN women from seeking justice within tribal courts.<sup>16</sup> Additionally, attorneys working for the U.S. Attorney General's Office, who are assigned to prosecute crimes in Indian Country, have alarmingly high declination rates.<sup>17</sup> According to a 2010 study from Amnesty International, 75 percent of sexual crimes in Indian Country are declined by federal prosecutors, resulting in a significant miscarriage of justice.<sup>18</sup>

The aforementioned statistics were part of the impetus for the 2013 Reauthorization of VAWA, which expanded jurisdiction to tribal courts to prosecute these crimes.<sup>19</sup> VAWA was designed to combat intimate partner violence — violence between individuals in romantic relationships. Thus, the act does not include protections against sexual violence committed by individuals who are strangers to their victims.<sup>20</sup> In order for sexual violence to be properly combated in Indian Country, serious changes must occur in federal

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<sup>15</sup> This applies except when “special domestic violence criminal jurisdiction” under VAWA 2013 applies, *see infra* note 123.

<sup>16</sup> *Id.* The Major Crimes Act, 18 U.S.C. § 1153(a); WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 149-151, 189 (1998).

<sup>17</sup> A declination of prosecution may be made by an attorney, but also may be made as an agreement between the aggrieved party and the claimant. A declination of prosecution may be made for many reasons, such as weak evidence or a conflict of interest. Benjamin Greenblum, *What Happens to a Prosecution Deferred-Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1868 (2005); Amnesty International, *supra* note 14.

<sup>18</sup> Amnesty International, *supra* note 14.

<sup>19</sup> S. Rep. No. 112-153, at 3 (2012) (Providing justification for the then-2011 Reauthorization of VAWA which eventually became the 2013 Reauthorization).

<sup>20</sup> Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 904 (2013). (“(a) Definitions. — In this section: (1) Dating violence. — The term ‘dating violence’ means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. (2) Domestic violence. — The term ‘domestic violence’ means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian [C]ountry where the violence occurs.”) [hereinafter VAWA 2013].

Indian law and policy, starting with amending of Title IX of VAWA.<sup>21</sup>

Sexual violence in Indian Country has reached the point where it is now an entrenched part of Indian women's lives on the reservation. Because of this, it is necessary that Title IX of VAWA be expanded to offer further protections. Not only is this issue widespread, but also, the current system provides victims little to no recourse from the federal government, which under the Major Crimes Act framework is supposed to be the sole arbiter for these issues. Although Title IX of VAWA gives tribes jurisdiction in select circumstances, it does not provide protection to women who are attacked by non-intimate partners; therefore, VAWA must be expanded to eradicate this loophole.

This article will discuss the need for an expansion of VAWA to properly protect all AI/AN women living in Indian Country. To justify VAWA's expansion, this article recommends that Title IX be amended to contain a "stranger and acquaintance violence" definition that would provide coverage to those victims who do not meet the "dating" or "domestic violence" definitions currently provided in VAWA. This additional definition would cover those parties 1) with an ongoing social or work relationship, 2) engaged in a brief romantic or non-romantic engagement, and 3) with no current or previous relationship between them. This amendment is necessary to meet the original intent of VAWA, to protect all women from sexually violent crimes who do not meet the "domestic" or "dating" relationship definitions with their perpetrator.

This article will first explore the rampant issue of sexual violence on the reservation, its origins, and how current violence relates directly to the pervasive legacy of colonialism, which remains alive today. Second, this article will discuss the jurisdictional maze of tribal, state, and federal courts that has led to difficulty in prosecuting sexual crimes perpetrated against AI/AN women. Third, this article will review the 2013 reauthorization of VAWA, focusing in particular on how Title IX deals with special jurisdiction for tribal courts over non-AI/AN perpetrators. In conclusion, this article will argue that in light of recent crime rates, and gaps between tribal and federal law jurisdiction, Title IX of

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<sup>21</sup> *Id.* Title IX of VAWA is the section designated for the protection of AI/AN women.

VAWA should be amended to expand tribal jurisdiction over sexual violence committed in Indian Country against AI/AN women by non-AI/AN strangers.

### III. AN OVERVIEW OF SEXUAL VIOLENCE IN INDIAN COUNTRY

AI/AN women face sexual violence in Indian Country at a far higher rate than any other ethnic group in the United States.<sup>22</sup> Coupled with the higher rate of violence against AI/AN women, is the fact that federal prosecutors decline to hear the majority of sexual violence cases against AI/AN women in Indian Country.<sup>23</sup> Additionally, there is a staggering lack of information on sexual violence in Indian Country, which causes AI/AN women to continue their pattern of silence. This pattern of silence leads to underreporting of assaults and ultimately a loss of faith in the criminal justice system.<sup>24</sup> Moreover, feminist and indigenous scholars have developed the understanding that sexual assault and rape in Indian Country was nonexistent prior to colonialism, and that modern day sexual violence is a remnant of European conquest and colonialism.<sup>25</sup> Some scholars explain that these crimes exist as a

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<sup>22</sup> *The Facts on Violence Against American Indian/American Native Women Fact Sheet*, FUTURES WITHOUT VIOLENCE, <https://www.futureswithoutviolence.org/userfiles/file/Violence%20Against%20AI%20AN%20Women%20Fact%20Sheet.pdf> [hereinafter *Futures Without Violence*].

<sup>23</sup> See *infra* note 36.

<sup>24</sup> *Id.*

<sup>25</sup> Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J. OF L. AND PUB. POL'Y 121, 129-130 (2004) [hereinafter *Indigenous Jurisprudence*]. ("Several scholars have suggested that sexual violence may have been extremely rare in indigenous communities in pre-Colonial times. Evidence lies in both the experience of Native women prior to contact as well as the behavior of Native men, as recorded by European explorers, settlers, and traders. For example, many writers have noted that North American indigenous cultures held women in higher regard than did European cultures. Anthropologist Peggy Reeves Sanday has postulated that in rape free societies, women are respected and influential members of the community. In tribal communities, women and children were not considered to be property of men. Indeed, women were powerful spiritual and political leaders in many communities. Other evidence for low rates of sexual violence comes from historians' examinations of the behavior of indigenous men. Most commonly reported is the interesting fact that Native men did not sexually violate prisoners of war. Laurel Thatcher Ulrich indicates that the Puritans were 'amazed at the sexual restraint of Indian men, who never raped their captives. Brigadier General James Clinton of the Continental Army told his troops in 1779, '[b]ad as the savages are, they never violate the chastity

byproduct of *transgenerational trauma* – trauma experienced by past generations of AI/AN women that has been passed on to their offspring.<sup>26</sup>

*A. Under Reporting and High Declination Rates*

Statistics are an inadequate representation of the issue of sexual violence in Indian Country.<sup>27</sup> This is due to the underreporting of sexual crimes to tribal officials and federal authorities.<sup>28</sup> Nonetheless, the numbers that do exist are shocking. According to estimates contained in a 2004 Department of Justice report, instances of violence against AI/AN women are as much as 50 percent higher than the next most victimized group in America.<sup>29</sup> Moreover, the report shows that AI/AN women are two and a half times more likely to be raped or sexually assaulted than women in the United States in general (five per 1,000 vs. two per 1,000, AI/AN women vs. other groups, respectively).<sup>30</sup> One in three AI/AN women will be raped during their lifetime (for non-AI/AN women in the United States, the risk is closer to one in five).<sup>31</sup> Further, data

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of any women, their prisoners. Furthermore, historical records include far more accounts of sexual abuse of indigenous women by Europeans than accounts of European women by indigenous men. Rape, when it did occur, was severely punished by Native justice systems. Even Europeans who wrote disparagingly about Native people noted that Native people abhorred sexual violence. One such account comes from George Croghan, who testified about Indians in the Middle Atlantic colonies in the late 18th century: ‘I have known more than onest thire Councils, order men to be put to Death for Committing Rapes, wh[ich] is a [c]rime they [d]espise.’”).

<sup>26</sup> *Id.* at 142; Daniel S. Schechter, *Intergenerational Communication of Maternal Violent Trauma: Understanding the Interplay of Reflective Functioning and Posttraumatic Psychopathology*, in SEPTEMBER 11: TRAUMA AND HUMAN BONDS, 115, 115-142 (Susan W. Coates et. al. eds., 2003) (suggesting that trauma experienced by one generation or transgenerational trauma, particularly post-traumatic stress disorder related trauma can be “passed on” to a future generation); *see infra* note 60.

<sup>27</sup> Futures Without Violence, *supra* note 22.

<sup>28</sup> *Id.*

<sup>29</sup> Steven W Perry, US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *American Indians and Crime- A BJS Statistical Profile 1992-2002*, 5, (2004).

<sup>30</sup> *Id.*

<sup>31</sup> Tjaden & Thoennes, *supra* note 9.

shows that perpetrators of sexual violence against AI/AN women are more often than not non-AI/AN men.<sup>32</sup>

The legal response to sexual violence in Indian Country has proven to be far from adequate. Due to jurisdictional restrictions, most tribes are unable to fully adjudicate sexual assault cases.<sup>33</sup> As this article will discuss in detail in section IV, under federal law, jurisdiction over certain crimes that take place in Indian Country, specifically rape and sexual assault, is limited to the federal government.<sup>34</sup> These jurisdictional complications require most sexual assault and rape victims in Indian Country to lay their trust with the federal government to prosecute.<sup>35</sup> Unfortunately, herein lies another problem because more often than not, federal prosecutors decline to hear these cases.

As stated earlier, the U.S. Attorney General's Office declines to prosecute about 75 percent of violent crimes reported in Indian Country. Specifically, 67 percent of these declinations are sexual violence cases.<sup>36</sup> These declination rates are reportedly one of the key factors causing underreporting from AI/AN women.<sup>37</sup> Although the specific statistics for AI/AN underreporting rates are inconclusive, the Department of Justice has stated that it believes only 50 percent of sexual assault incidents were reported to law enforcement,<sup>38</sup> and only 41.2 percent of those reports led to an arrest.<sup>39</sup> Underreporting masks the pervasive nature of sexual

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<sup>32</sup> The rate at which non-AI/AN men sexually assault or rape AI/AN women also showcases a continued legacy of colonialism. The racial motivation in these attacks demonstrates the mindset of European settlers, that AI/AN women are more "rapable" because they do not have the same bodily integrity as non-AI/AN women, *see infra* note 43. This is also particularly troublesome under the ruling of *Oliphant* which held that tribes could not adjudicate non-AI/AN perpetrators in a criminal suit, *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). This was partially fixed with the 2013 Reauthorization of VAWA, yet AI/AN women are still not completely protected – this will be discussed more thoroughly in Section V. *See generally* Chen, *supra* note 11.

<sup>33</sup> The Major Crimes Act will be explored more thoroughly in section IV.

<sup>34</sup> *Id.* *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

<sup>35</sup> *Id.*

<sup>36</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-167R, U.S. DEPARTMENT OF JUSTICE DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS, 3 (2010).

<sup>37</sup> S. Rep. No. 112-265 (2012).

<sup>38</sup> JENNIFER L. TRUMAN, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., CRIMINAL VICTIMIZATION, 2010, 1 (2011).

<sup>39</sup> D. Lisak et. al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, AM. PROSECUTORS RES. INST., 1 (2009).

violence in Indian Country.<sup>40</sup> Because of the well-known underreporting and declination rates, AI/AN women are less likely to speak up about incidents of rape and sexual assault thus creating a cyclical pattern of silence.<sup>41</sup> Although these crimes are pervasive against all women, the lack of repercussions for such crimes is deeply entrenched in the legacy of colonialism and its parasitic effect on AI/AN people.

*B. The Legacy of Colonialism, the Effects of Transgenerational Trauma, and its Effect on AI/AN Women*

Anthropological studies demonstrate that the prevalence of sexual violence in AI/AN communities was far lower, if existent at all, before European contact.<sup>42</sup> The rise in violence was predominately rooted in the perceptions that Europeans had of AI/AN people upon arrival.<sup>43</sup> It has been documented that the male European colonists looked at AI/AN people as “inherently dirty” while viewing themselves as “clean” and “pure.”<sup>44</sup> Relying on this viewpoint, colonists justified the abuse of AI/AN women by considering them “rapable,” because they did not have the same bodily integrity as white women.<sup>45</sup> However, AI/AN women have not always faced such treatment by men.

Before European contact, many AI/AN tribes were egalitarian and considered women to be very esteemed figures. In some cases, tribal culture and society were matrilineal in structure.<sup>46</sup> For example, in many AI/AN tribes, women were viewed as leaders, whose positions of leadership could range from spiritual to even

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<sup>40</sup> Talib Ellison, *Surviving Racism and Sexual Assault: American Indian Women Left Unprotected*, 1 THE MOD. AM. 21, 21-25 (2005).

<sup>41</sup> *Id.* Because AI/AN women hear statistics based on underreported or unreported numbers, they assume that the issue is not as widespread as it truly is and therefore that their assault or rape was a rare occurrence, unlikely to be believed.

<sup>42</sup> Indigenous Jurisprudence, *supra* note 25, at 129-130.

<sup>43</sup> John Ahni Schertow, *Colonialism, Genocide, and General Violence: Indigenous Women*, INTERCONTINENTAL CRY, (Dec. 15 2006), <https://intercontinentalcry.org/colonialism-genocide-and-gender-violence-indigenous-women/>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

militaristic in nature.<sup>47</sup> The nature of these structures, scholars note, resulted in very little violence against women.<sup>48</sup> However, the matriarchal structure of Indian tribes conflicted with the Western-European perception and treatment of women. At the time of colonialism, women in Europe were rarely given high status and were often antagonized and persecuted.<sup>49</sup> As one example, during the colonial period, the European witch hunts were primarily backed by a strong hatred for women — these resulted in the death of approximately nine million people — 90 percent of which were women.<sup>50</sup> This practice of misogyny was carried over to America and was established as the mechanism of colonization.

Part of the act of colonization included the rape and sexual assault of AI/AN women.<sup>51</sup> For example, in the mid-1800s, the State of California hired white men to kill AI/AN people; sexual violence was routine in these operations.<sup>52</sup> The following account demonstrates the nature of the colonial-rape mindset:

When I was in the boat I captured a beautiful Carib woman . . . I conceived desire to take pleasure . . . I took a rope and thrashed her well, for which she raised such unheard screams that you would not have believed your ears. Finally we came to an agreement in such a manner that I can tell you that she seemed to have been brought up in a school of harlots.

Two of the best looking of the squaws were lying in such a position, and from the appearance of the genital organs and of their wounds, there can be no doubt that they were first ravished and then shot dead. Nearly all of the dead were mutilated.<sup>53</sup>

This white male perspective of Indian women became entrenched not only in the individual's viewpoints, but also as a mechanism for federal policy.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

The legacy of colonialism and its effect on sexual violence was furthered with the creation of Indian boarding schools, where sexual abuse ran rampant. Although boarding schools were introduced as a part of the federal government's "assimilation" policy,<sup>54</sup> a blind eye was often turned to the sexual abuse committed at the hands of priests, nuns, and other boarding school staff.<sup>55</sup> Often, these boarding school staff members were government employees whose stories would be believed over the AI/AN victim:

The government employees that they put into the schools had families but still there were an awful lot of Indian girls turning up pregnant. Because the employees were having a lot of fun, and they would force a girl into a situation, and the girl wouldn't always be believed. Then, because she came up pregnant, she would be sent home in disgrace. Some boy would be blamed for it, never the government employee. He was always scot-free. And no matter what the girl said, she was never believed.<sup>56</sup>

Transgenerational trauma linked to the history of sexual violence inflicted upon AI/AN people has arguably led to high rates of

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<sup>54</sup> The goal of the "assimilation" policy was to settle the "Indian question" by attempting to Christianize and force elements of white America onto AI/AN populations. The hope was that by forcing AI/AN populations to assimilate to the mainstream culture that the issue of "what to do with the Indians" would go away. As a part of this, teachers, missionaries, and other federal employees were sent to Indian Country to begin the process and with that came Indian boarding schools where AI/AN children were sent to begin the assimilation process. However, the positions of power given to figures of authority in the boarding schools resulted in physical and sexual abuse, rape, and even murder of AI/AN children. Ironically, the process of assimilation failed in its attempt to create a harmonious melting pot of white Americans and AI/AN people, but instead opened the floodgates for opportunities of abuse and a continuance of colonial terrorism upon AI/AN children. *See generally* FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 15 (1984).

<sup>55</sup> Schertow, *supra* note 43; Ruth Hopkins, *Sexual Trauma: One Legacy of the Boarding School Era*, LAST REAL INDIANS, <http://lastrealindians.com/sexual-trauma-one-legacy-of-the-boarding-school-era-ruth-hopkins/> (last visited Month day, year).

<sup>56</sup> *Id.*



alcoholism,<sup>57</sup> post-traumatic stress disorder (PTSD),<sup>58</sup> and suicide.<sup>59</sup> However, the study of transgenerational trauma has shown light onto the interesting scientific proposition that trauma is something that can be transmitted through genetics and carried on from generation to generation.

Recent scientific studies have shown that trauma experienced by past generations can be transmitted to one's offspring.<sup>60</sup> According to the Academy of Pediatrics, it is possible for one's DNA to be strongly influenced by experience, meaning that it is possible for trauma to be attached to one's genes and passed onto the next generation.<sup>61</sup> According to Bonnie Duran, associate professor at the University of Washington School of Public Health and Director for Indigenous Health Research at the Indigenous Wellness Research Institute, "[m]any present-day health disparities can be traced back through epigenetics<sup>62</sup> to a 'colonial health deficit,' the result of colonization and its aftermath."<sup>63</sup> Unfortunately, this means that those with ancestors who have experienced trauma from sexual violence may pass on that trauma to the next generation. This makes

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<sup>57</sup> Today, women who have survived sexual violence are more likely to report experiencing issues with depression, suicidal ideation, drug abuse, and alcoholism. D.K. Bohn, *Lifetime Physical and Sexual Abuse, Substance Abuse, Depression, and Suicide Attempts Among Native American Women*, 24 ISSUES MENTAL HEALTH NURSING 333, 333 (2003). In one case it was reported that 84% of Alaskan Native women entering into a residential substance abuse treatment facility had experienced rape. Bernard Segal, *Responding to Victimized Alaska Native Women in Treatment for Substance Use*, 36 SUBSTANCE USE & MISUSE 845, 851 (2001).

<sup>58</sup> DOLORES S. BIGFOOT & SUSAN R. SCHMIDT *Honoring Children, Mending the Circle: Cultural Adaption of Trauma-Focused Cognitive-Behavioral Therapy for American Indian and Alaska Native Children* 66 J. OF CLINICAL PSYCHOL. 847, 849 (2010).

<sup>59</sup> *Id.*

<sup>60</sup> LeManuel "Lee" Bitsoi, Navajo, PhD Research Associate in Genetics at Harvard University suggests that transgenerational trauma (or in the article "intergenerational trauma") can cause PTSD, depression and type 2 diabetes to be carried on from one generation to the next. Mary Annette Pember, *Trauma May Be Woven Into the DNA of Native Americans*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 28, 2015), <http://indiancountrytodaymedianetwork.com/2015/05/28/trauma-may-be-woven-dna-native-americans-160508>.

<sup>61</sup> *Id.*

<sup>62</sup> Epigenetics is a study in the field of genetics focused on how external or environmental factors may affect gene activation and how cells read genes. *See generally* DAVID S. MOORE, THE DEVELOPING GENOME: AN INTRODUCTION TO BEHAVIORAL EPIGENETICS 22 (2015).

<sup>63</sup> *Id.*

each instance of sexual violence not only a horrific present day trauma, but a frightening reminder of past transgressions suffered by one's ancestors.

In summation, rampant sexual violence in Indian Country perpetuates the marginalization of abused AI/AN women and allows the continuous pattern of depravity to go unpunished. The underreporting of sexual violence committed against AI/AN women in Indian Country coupled with drastically low prosecution rates for sexual offenders has cast thousands of women into a shadow of silence.<sup>64</sup> The legacy of colonialism and its use of rape and sexual assault as a weapon have tarnished the history of AI/AN people, and continues to haunt and perpetuate the abuse of AI/AN women still to this day – be it through current abuse or transgenerational trauma. This epidemic of sexual violence is further convoluted by the complex nature of criminal jurisdiction in Indian Country.

#### IV. CRIMINAL JURISDICTION IN INDIAN COUNTRY

The issue of prosecuting sexual violence in Indian Country is further complicated by complex jurisdictional issues – particularly criminal jurisdiction. Criminal jurisdiction in Indian Country has a long history of case law and statutes that implicate tribal, federal, and state law.<sup>65</sup> Because of the constantly changing legal landscape of Indian Country, relevant jurisprudence and statutes cause criminal cases to be adjudicated in tribal, federal, or state court based on arbitrary and confusing distinctions. In order to understand why determining jurisdiction is so difficult in Indian Country, the case law must be explored thoroughly.

*Cherokee Nation v. Georgia*<sup>66</sup> and *Worcester v. Georgia*<sup>67</sup> provide the foundation, explaining the status of AI/AN tribes under federal law and the basis for federal jurisdiction in Indian Country.

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<sup>64</sup> Although declination rates from federal prosecutors may be high on their own, much of the reason for said declinations is due to weak evidence in most cases. If women do not report rape or sexual assaults committed against them, they never have the chance for a federal prosecutor to make an evidentiary assessment and therefore never give themselves the chance to achieve justice. Futures Without Violence, *supra* note 22

<sup>65</sup> ARVO Q. MIKKANEN, U.S. ATTORNEY'S OFF., WESTERN DISTRICT OF OKLA., INDIAN COUNTRY CRIMINAL JURISDICTION CHART (2010).

<sup>66</sup> See *infra* note 76.

<sup>67</sup> See *infra* note 78.

*Ex parte Crow Dog*,<sup>68</sup> *Oliphant v. Suquamish Indian Tribe*,<sup>69</sup> and *U.S. v. Lara*<sup>70</sup> address the major issues regarding criminal jurisdiction in Indian Country over the course of two centuries. Lastly, statutes such as the Major Crimes Act,<sup>71</sup> Assimilative Crimes Act,<sup>72</sup> and Public Law 280<sup>73</sup> further address the labyrinthine criminal-jurisdictional structure of Indian Country.

### A. Relevant Indian Law Jurisprudence

Much of the reason for the complicated criminal jurisdiction in Indian Country is rooted in the status of AI/AN tribes under Supreme Court precedent in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.<sup>74</sup> In *Cherokee Nation*, Chief Justice Marshall established that "the relationship of the tribes to the United States resembles that of a 'ward to its guardian.'" <sup>75</sup> At the time, this ruling was backed by the principle that AI/AN tribes were unable to govern themselves and that they must be governed by the "law of nations."<sup>76</sup> The "ward" relationship was further elaborated on in the *Worcester v. Georgia* ruling, which held that a state criminal statute

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<sup>68</sup> See *infra* note 79.

<sup>69</sup> See *infra* note 80.

<sup>70</sup> See *infra* note 86.

<sup>71</sup> See *infra* note 88.

<sup>72</sup> See *infra* note 90.

<sup>73</sup> See *infra* note 94.

<sup>74</sup> CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 23-25 (1988).

<sup>75</sup> *Id.*

<sup>76</sup> See generally *Cherokee Nation v. Ga.*, 30 U.S. 1, 1-2 (1831). The case was originally filed by the Cherokee Nation seeking a federal injunction against a Georgia state law that "go[es] directly to annihilate the Cherokees as a political society." The Cherokee Nation's writ to the Supreme Court requested that the Supreme Court void all Georgia laws extending into Cherokee land. Georgia tried to argue that the Cherokee Nation could not sue on the grounds that the Cherokee Nation was not a foreign nation "in the sense of [the] Constitution and law." Although the Supreme Court declined to rule on the merits of the case, Chief Justice Marshall did state that the Framers did not intend for AI/AN tribes to be considered foreign nations but rather "domestic dependent nations," and therefore, the Cherokee Nation lacked standing to sue as a foreign nation under the Constitution. However, Chief Justice Marshall did state that "the relationship of the tribes to the United States resembles that of a 'ward to its guardian,'" which serves as the foundation for federal-tribal jurisdictional jurisprudence, and was almost immediately built upon a year later in *Worcester v. Georgia*.

was inapplicable on AI/AN land and that the federal government was the sole authority to deal with affairs in Indian Country.<sup>77</sup>

Subsequently, the Supreme Court ruled in *Ex parte Crow Dog* that the federal government did not have criminal jurisdiction to prosecute the murder of a tribal member by another tribal member in Indian Country.<sup>78</sup> This was later reversed by Congress with the Major Crimes Act, which has further complicated the process of adjudicating sexual violence in Indian Country — and is discussed in great detail below.<sup>79</sup>

Following *Ex parte Crow Dog*, the Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe* that tribes do not have the inherent criminal jurisdiction to try and punish non-AI/AN individuals in Indian Country, unless that authority is granted by Congress through statute.<sup>80</sup> The ruling in *Oliphant* proves

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<sup>77</sup> Like *Cherokee Nation v. Georgia*, *Worcester* deals with a Georgia state law infringing on tribal lands. In the 1800s, Georgia passed a law prohibiting non-AI/AN people from living in Indian Country unless they obtained a permit to do so. Sam Worcester, a missionary, had been living in Cherokee land and refused to leave or apply for a permit. Worcester along with six others he had been living with were then arrested, which Worcester appealed to the Supreme Court. Chief Justice Marshall ruled in favor of Worcester and ruled that the Georgia state law was impermissible. However, the case is most famous for Marshall's dicta furthering the ideas from *Cherokee Nation* that the federal government is the sole authority for dealing with Indian affairs. See generally *Worcester v. State of Ga.*, 31 U.S. 515, 570 (1832).

<sup>78</sup> See generally *Ex parte Crow Dog*, 109 U.S. 556, 557 (1883) (This case surrounded the punishment of a Brule Sioux tribal member named Crow Dog who shot and killed another member of the same tribe, Spotted Tail. The Brule Sioux tribe's traditional code called for Crow Dog to pay restitution of \$600, eight horses, and one blanket to take care of Spotted Tail's family. However, the Territory of Dakota also heard the case and sentenced Crow Dog to death. Crow Dog appealed his case to the Supreme Court who found that unless Congress authorized jurisdiction, the state had no grounds to sentence Crow Dog. This was seen as a positive ruling for tribes because it illustrated the Supreme Court's respect for inherent sovereignty and the authority of tribes to govern themselves. Congress reacted to this ruling by passing the Major Crimes Act in 1885.); Sidney L. Haring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 194 (1989) ("*Crow Dog* is important because it is a bridge between the strong but ambiguous sovereignty language of *Worcester*, and the complete subjugation of Indians that followed *Crow Dog* with the passage of the Major Crimes Act... that put the tribes completely under the control of Congress and the American political process.").

<sup>79</sup> The Major Crimes Act gives exclusive jurisdiction to the federal government over crimes contained in the Act, which includes sexual violence.

<sup>80</sup> See generally *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) [hereinafter *Oliphant*]. In 1973, Mark Oliphant, a non-AI/AN man living permanently on Suquamish tribal land, was arrested for assaulting a tribal officer

particularly troublesome for adjudicating sexual violence committed by non-AI/AN perpetrators in Indian Country because it disallows tribal courts from trying non-AI/AN perpetrators.<sup>81</sup>

Under the ruling in *Oliphant*, tribal courts cannot adjudicate non-AI/AN crimes in Indian Country, even if the perpetrator lives within the exterior boundaries of the reservation.<sup>82</sup> The *Oliphant* court relied on the *Cherokee Nation* argument in holding that Congress is the sole authority in determining Indian affairs. Additionally, because Congress had not delegated the power to the tribe to try non-AI/AN perpetrators, they could not adjudicate.<sup>83</sup> *Oliphant* effectively bars the prosecution of sexual violence crimes in Indian Country because most incidents of rape and sexual assault, committed against AI/AN women, are perpetrated by non-AI/AN men.<sup>84</sup> Under *Oliphant*'s ruling, tribes have no jurisdiction over non-AI/AN perpetrators, and therefore, AI/AN women can seek no refuge in tribal courts for the crimes committed against them.<sup>85</sup>

Further, in *U.S. v. Lara*, the Supreme Court ruled that it is not considered double jeopardy to be tried in both federal and tribal court for the same crime because the United States and tribes are

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and resisting arrest. Oliphant filed a writ of habeas corpus in federal court claiming that he was not subject to tribal jurisdiction because he was not an AI/AN tribal member. Oliphant appealed his case to the Supreme Court, which held that AI/AN tribes do not have inherent criminal jurisdiction to try and punish non-AI/AN perpetrators and hence may not assume jurisdiction unless specifically granted by Congress to do so. The Supreme Court also cited *Cherokee Nation v. Georgia*'s "domestic dependent nation" language in stating that the federal government has the power to both explicitly and implicitly strip powers from the tribe. *Oliphant* was a major loss for AI/AN tribes and the self-determination policy in general. To this day, *Oliphant* has not been overturned and with the exception of VAWA, which will be discussed more in the next section, tribal courts cannot try non-AI/AN perpetrators for crimes they commit on the reservation.

<sup>81</sup> *Id.* This will be discussed more thoroughly in Section V.

<sup>82</sup> *Id.* at 195.

<sup>83</sup> *Id.* at 208 (Quoting Marshall's opinion in *Cherokee Nation*: "Indians do not have criminal jurisdiction over non-AI/AN perpetrators absent affirmative delegation of such power by Congress.").

<sup>84</sup> Sarah Deer, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, 4 TRIBAL L.J. 3, (2003).

<sup>85</sup> *Id.* This is the primary concern of this article – AI/AN women do not have the ability to properly adjudicate non-AI/AN perpetrators within their tribal courts and therefore must seek refuge with the federal government yet face an alarmingly high rate for declination.

separate sovereigns.<sup>86</sup> This means that both the tribe and federal government could try a perpetrator of sexual violence and not violate the perpetrator's constitutional protection against double jeopardy. In addition to jurisprudence, there are several relevant federal statutes that shape the jurisdictional scaffolding in Indian Country.

### *B. Relevant Federal Criminal Statutes in Indian Country*

The most relevant statute regarding criminal activity, specifically sexual violence, in Indian Country is the Major Crimes Act.<sup>87</sup> The Major Crimes Act grants jurisdiction to the federal government if an AI/AN tribal member commits one of many numerous crimes against another AI/AN or non-AI/AN tribal member in Indian Country.<sup>88</sup> However, as stated earlier, under *U.S. v. Lara*, an AI/AN tribal member can be tried in both tribal and federal court for the same crime and it not be considered double jeopardy.<sup>89</sup> In instances where no federal law is applicable for a crime committed in Indian Country, the Assimilative Crimes Act applies.<sup>90</sup>

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<sup>86</sup> See generally *United States v. Lara*, 541 U.S. 193, 193 (2004). Billy Jo Lara, an enrolled member of the Turtle Mountain Band of Chippewa Indians, lived with his wife, a Spirit Lake Santee tribal member, on the Spirit Lake Reservation. Lara was banished from the Spirit Lake Reservation then returned and was arrested for public intoxication and struck a BIA officer during the arrest. Lara was charged by both tribal and federal courts with assault among other charges. Following appeals, the case was granted cert by the Supreme Court. Lara argued that by allowing both the tribe and the federal government to try him, the federal government had violated his constitutional prohibition of double jeopardy. The Supreme Court held that because the tribe had inherent sovereignty, double jeopardy did not apply. If two separate sovereign bodies brought charges against Lara, then it is not considered double jeopardy.

<sup>87</sup> The Major Crimes Act, 18 U.S.C. § 1153(a) (1948).

<sup>88</sup> *Id.* The Major Crimes Act covers all sexual abuse crimes under 18 U.S.C. chapter 109A, including:

- § 2241 – [A]ggravated sexual abuse
- § 2242 – [S]exual abuse
- § 2243 - Sexual abuse of a minor or ward
- § 2244 - Abusive sexual contact

Within those definitions, the word or phrase “rape” or “sexual assault” are not used, but “rape” and “sexual assault” fall under the mentioned definitions.

<sup>89</sup> *Lara*, 541 U.S. at 193-194.

<sup>90</sup> The Assimilative Crimes Act, 18 U.S.C. § 13(a).

The Assimilative Crimes Act makes state laws applicable to conduct occurring on lands reserved or acquired by the federal government. Under the ruling of *Williams v. United States*, the Supreme Court interpreted that the Assimilative Crimes Act applied in Indian Country as well.<sup>91</sup> Further, the *Williams* court held that in absence of a federal criminal statute (that would otherwise apply under the Major Crimes Act), the Assimilative Crimes Act requires that an applicable state law must be used in place of federal law.<sup>92</sup> For example, in the instance where there was no applicable federal statute that applied to the crime of rape committed in Indian Country, the applicable state statute would apply. Moreover, Public Law 280 (PL-280) takes state jurisdiction one step further by supplanting federal criminal jurisdiction where federal jurisdiction would apply in Indian Country.

As stated in *McClanahan v. Arizona State Tax Commission*, PL-280 establishes "a method whereby States may assume [civil or criminal] jurisdiction over reservation Indians."<sup>93</sup> In states that have "opted-in"<sup>94</sup> or chosen to exercise their PL-280 jurisdiction, the state, not the federal government, has criminal and civil jurisdiction over Indian Country.<sup>95</sup> This means that crimes committed in Indian Country that would otherwise be prosecuted by the federal government under the Major Crimes Act would be prosecuted by the state.<sup>96</sup> However, because of the complicated jurisdictional structure that comes with Indian Country, sexual violence is far

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<sup>91</sup> *Williams v. United States*, 327 U.S. 711 (1946), (extending the Assimilative Crimes Act to Indian Country by 18 U.S.C. § 1152, allowing the borrowing of state law when there is no applicable federal statute).

<sup>92</sup> *Id.*

<sup>93</sup> *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 177 (1973).

<sup>94</sup> Ada Pecos Melton and Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, THEANNAINSTITUTE.ORG, <http://theannainstitute.org/American%20Indians%20and%20Alaska%20Natives/Public%20Law%20280%20AIAN%20Victims%20of%20Crime.pdf>. (Last visited Jan. 23, 2017) ("Public Law 280 also authorized any non-mandatory state to assume civil and/or criminal jurisdiction over Indian country within its borders. These non-mandatory states had the option of taking partial jurisdiction without tribal consent until after the 1968 amendments were enacted. In some instances, these transfers of jurisdiction under Public Law 280 have also been returned... back to the federal government, overturned by the courts, or have never been implemented. The optional states fall into two categories - states with disclaimers in their state constitutions limiting state jurisdiction over Indian country and states with these state constitutional disclaimers").

<sup>95</sup> 18 U.S.C. § 1162(a) (1953); 28 U.S.C. § 1360.

<sup>96</sup> *Id.*

more difficult to prosecute in Indian Country than in the state or federal jurisdiction over non-Indians outside of Indian Country.

As stated earlier, the declination rate by federal prosecutors for crimes committed in Indian Country is alarmingly high, and issues of mistrust from tribal members in PL-280 states are just as disconcerting.<sup>97</sup> Although the federal government may decline many sexual violence cases, the Bureau of Indian Affairs is at least required to make reports on declinations and statistics on sexual violence in Indian Country,<sup>98</sup> whereas PL-280 states are not under the authority of the Tribal Law and Order Act of 2010.<sup>99</sup> Further, PL-280 states do not receive adequate funding from the federal government resulting in under-resourced law enforcement and criminal justice for AI/AN people in Indian Country.<sup>100</sup> Ultimately, these issues are rooted in the complicated nature of *Cherokee Nation's* "domestic dependent nation"<sup>101</sup> language, which limits tribes from being recognized as full sovereigns. This language has forced Congress and the Supreme Court to lay out a seemingly endless myriad of statutes and decisions, respectively, to determine jurisdiction for crimes committed on tribal lands.

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<sup>97</sup> Amnesty International, *supra* note 14.

<sup>98</sup> Debbie Ho & John Harte, *Summary and Explanation of the Tribal Law and Order Act of 2010*, MAPETSI POLICY GROUP, <http://www.narf.org/nill/resources/TLOA/tloamapetsi.pdf> ("Requires FBI and U.S. Attorneys to maintain data when declining to prosecute violent crimes in Indian [C]ountry which will encourage more aggressive prosecutions of rapes and sexual assaults.").

<sup>99</sup> Sarah Deer, et al., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women*, TRIBAL L. AND POL'Y INST. 6 (2007) [hereinafter Focus Group]; The Tribal Law and Order Act of 2010 (Pub.L. 111-211, H.R. 725, 124 Stat. 2258, enacted July 29, 2010) (Under Sec. 212 (c) & (d) of the Tribal Law and Order Act, "if a United States Attorney declines to prosecute, or acts to terminate prosecution of, an alleged violation of Federal criminal law in Indian [C]ountry, the United States Attorney shall coordinate with the appropriate tribal justice officials regarding the status of the investigation and the use of evidence relevant to the case in a tribal court with authority over the crime alleged." Additionally, "[t]he [United States] Attorney shall submit to the Native American Issues Coordinator to compile on an annual basis and by Federal judicial district, information regarding all declinations of alleged violations of Federal criminal law that occurred in Indian [C]ountry that were referred for prosecution by law enforcement agencies, including —

A - the types of crimes alleged;

B - the statutes of the accused as [AI/AN] or non-[AI/AN];

C - the statuses of the victims as [AI/AN]; and D - the reasons for

deciding to decline or terminate the prosecutions.").

<sup>100</sup> Focus Group, *supra* note 99, at 7.

<sup>101</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 1-2 (1831).



The jurisdictional maze of Indian Country convolutes the issue of prosecuting sexual violence against AI/AN women on the reservation. Under *Cherokee Nation v. Georgia*, tribes are recognized as “domestic dependent nations,” which gives them a unique status and relationship with the federal government. This relationship requires the Supreme Court and Congress to create special jurisdictional rules regarding Indian Country. The “domestic dependent nation” status in *Cherokee Nation v. Georgia* serves as precedent for cases such as *Oliphant v. Suquamish Indian Tribe* and *U.S. v. Lara*, cases in which the Supreme Court has attempted to determine the boundaries of tribal jurisdiction – however, this has also required revisiting. Further, Congress has established additional limits on tribal jurisdiction with the passage of the Major Crimes Act, the Assimilative Crimes Act,<sup>102</sup> and PL-280 – all of which create major hurdles for AI/AN women attempting to prosecute claims of sexual violence. Fortunately, Congress is seemingly aware of these issues and has attempted to remedy them through the Violence Against Women Reauthorization Act of 2013.

#### V. THE VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013

Before delving into the current issues revolving around VAWA’s application, it is important to understand the law’s background and necessity. In 1993, during the World Conference on Human Rights, it was concluded that civil society and government must acknowledge the rising issue of domestic violence as not only an issue of public policy, but also a concern of human rights.<sup>103</sup> This conference, as well as the passage of the Declaration on the Elimination of Violence Against Women, by the United Nations, led to the recognition that domestic violence must be re-prioritized in the United States’ law.<sup>104</sup>

On September 13, 1994, VAWA was signed into law by President Bill Clinton. It became Title IV of the Violent Crime

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<sup>102</sup> *Williams v. United States*, 327 U.S. 711 (1946), (interpreting Assimilative Crimes Act as to apply to Indian Country).

<sup>103</sup> Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. OF INT’L L. 152, 152-167 (1994).

<sup>104</sup> *Id.*

Control and Law Enforcement Act of 1994.<sup>105</sup> The Act provides \$1.6 billion toward the investigation and prosecution of violent crimes committed against women, and it was initially passed with bipartisan support.<sup>106</sup> VAWA provides nationwide legal protection to women who are faced with domestic violence,<sup>107</sup> dating violence,<sup>108</sup> stalking,<sup>109</sup> and sexual assault.<sup>110</sup>

VAWA contains several definitions regarding the various kinds of violence against women that it covers. Although VAWA covers many areas, only its provisions on “domestic violence” and “dating violence” will be covered in this article.<sup>111</sup>

The definition of “sexual assault” under VAWA clarifies that the crime of sexual assault is considered the same in Indian Country as it is in federal and state jurisdiction, when addressing violence between intimate partners.<sup>112</sup> Currently, sexual assault is covered by both “domestic violence” and “dating violence,” but only within the context of those prescribed relationships. This means that a sexual

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<sup>105</sup> Peggy Grauwiler & Linda G. Mills, *Moving Beyond the Criminal Justice Paradigm: A Radical Restorative Justice Approach to Intimate Abuse*, 31 J. SOC. & SOC. WELFARE 49 (2004) (Title IV is codified in part at 42 U.S.C. §§ 13701-14040).

<sup>106</sup> *Turning the Act into Action: The Violence Against Women Law*, S. Rep. 103rd Cong. 1-3 (1993) (statement of Sen. Joe Biden) [hereinafter *Turning the Act*].

<sup>107</sup> 42 U.S.C. § 13925(a)(8) (2006).

<sup>108</sup> *Id.* at (a)(10).

<sup>109</sup> *Id.* at (a)(30).

<sup>110</sup> *Id.* at (a)(29); Originally, VAWA 1994 did not contain provisions for the protection of AI/AN women specifically. The first reauthorization of VAWA in 2005 expanded VAWA to Indian Country by creating programs for AI/AN sexual and domestic violence survivors; however, it was not until the 2013 reauthorization that Title IX came to be, which gave tribes special jurisdiction to prosecute non-AI/AN offenders for sexual and domestic abuse. *See generally* LISA N. SACCO, CONG. RESEARCH SERV., R42499, THE VIOLENCE AGAINST WOMEN ACT: OVERVIEW, LEGISLATION, AND FEDERAL FUNDING (2015).

<sup>111</sup> The main critique of this article is to demonstrate that the current construction and definitions of VAWA do not protect AI/AN women from violence committed against them by strangers or acquaintances. First, the definition for “domestic violence” only focuses on actions done by “current or former spouse or intimate partner of the victim.” Second, the definition of “dating violence” refers to someone who “is or has been in a social relationship of a romantic or intimate nature with the victim.” Both of these groups do not include actions done by those unknown to the victim. Lastly, the definition of “sexual assault” is used to clarify what constitutes the crime under VAWA.

<sup>112</sup> Lastly, the definition of sexual assault under VAWA which is also important for the analysis of the article is as follows: “the term ‘sexual assault’ means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks the capacity to consent.” *Supra* note 107, at (a)(29).

assault perpetrated by a non-AI/AN man who does not have a present or prior relationship (as defined under “domestic” or “dating violence”) with the victim cannot currently be prosecuted in tribal court. VAWA’s definition for “domestic violence” includes:

Any felony or misdemeanor crimes of violence committed by a *current or former spouse or intimate partner of the victim*, by a person with whom the victim shares a child in common, by a person who is *cohabitating with or has cohabitated* with the victim as a spouse or intimate partner ...<sup>113</sup>

The italicized sections showcase that in order for VAWA to be triggered under the “domestic violence” language, the perpetrator must be one of the following: 1) a former or current spouse or intimate partner of the victim, 2) a person with whom the victim shares a common child, or lastly, 3) a cohabitant or previous cohabitant of the victim. In addition to “domestic violence,” VAWA’s definition for “dating violence” covers those who are abused by a partner with whom the victim is romantically or intimately involved. Under VAWA, the term “dating violence” means violence committed by a person:

- A) Who *is or has been in a social relationship of a romantic or intimate nature with the victim*; and
- B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - (i) The *length* of the relationship
  - (ii) The *type* of relationship.
  - (iii) The *frequency of interaction* between the persons involved in the relationship.<sup>114</sup>

Essentially, a female AI/AN victim must be or have been in a social relationship of romantic or intimate nature with her perpetrator in order to prosecute the perpetrator for “dating violence.”<sup>115</sup>

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<sup>113</sup> 42 U.S.C. § 13925, *supra* note 108, at (a)(8).

<sup>114</sup> 42 U.S.C. § 13925, *supra* note 108, at (a)(10)(emphasis added).

<sup>115</sup> *Id.*

Additionally, to determine if such a relationship exists, the length, type, and frequency of interaction between the persons in the relationship must be taken into account.<sup>116</sup> Ultimately, this is arbitrary and non-inclusive to those women whose relationships may not have been very serious. Although this definition grants some legal protection to women beyond just those in domestic partnerships and cohabitation relationships, the definition for “dating violence” is still very limited in scope. Fortunately, under Title IX of the 2013 reauthorization of VAWA, both of these provisions are expanded to protect AI/AN women living on the reservation.<sup>117</sup>

As stated earlier, AI/AN women experience sexual violence at a far higher rate than any other group in the United States. Unfortunately, in its ruling on *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that tribal courts lacked criminal jurisdiction over non-AI/AN defendants.<sup>118</sup> *Oliphant*’s ruling allows non-AI/AN perpetrators to commit violence Indian women on the reservation to act without punishment.<sup>119</sup> However, Title IX under the reauthorization of VAWA creates a partial fix to *Oliphant*, as it covers domestic and “dating violence” crimes committed by non-AI/AN offenders.<sup>120</sup>

With the creation of Title IX of VAWA, Congress amended the Indian Civil Rights Act of 1968 (ICRA) and gave “special domestic violence criminal jurisdiction” to tribal courts when a non-AI/AN offender commits an act of 1) domestic violence, 2) dating violence, or 3) violates a protection order.<sup>121</sup> This would allow an AI/AN woman assaulted in a way that meets the criteria of “domestic” and “dating” violence to bring her claim against the non-AI/AN offender in tribal court.<sup>122</sup> However, under this “special domestic violence criminal jurisdiction,” the tribe would not have adjudicatory jurisdiction over cases where 1) both the victim and defendant are non-AI/AN, 2) the non-AI/AN perpetrator lacks “sufficient ties to

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<sup>116</sup> *Id.*

<sup>117</sup> VAWA 2013, *supra* note 20.

<sup>118</sup> *Oliphant*, *supra* note 80, at 212.

<sup>119</sup> *Id.*

<sup>120</sup> Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 438 (2014) [hereinafter Ennis].

<sup>121</sup> *Id.* at 421.

<sup>122</sup> *Id.* at 439.

the tribe,”<sup>123</sup> and 3) when the crime did not take place on the reservation of the adjudicating tribe.<sup>124</sup> To clarify, one does not need to be a member of the tribe where the crime took place, but may just be an AI/AN woman assaulted on the reservation of the tribe attempting to adjudicate.<sup>125</sup> Additionally, in order for VAWA to apply, a tribe must “opt-in” to create this “special domestic violence criminal jurisdiction,” otherwise AI/AN women would still be unable to seek recourse in their tribal courts.<sup>126</sup> Although VAWA does grant the tribe this new jurisdictional ability, its sentencing terms are still limited.

Additionally, under VAWA’s amendments to ICRA, tribal sentencing is expanded from one year and a fine of \$5,000,<sup>127</sup> to three years and a fine of \$15,000, per offense.<sup>128</sup> Moreover, the tribe can only impose a total penalty of a term of nine years in a criminal proceeding.<sup>129</sup> Unfortunately this does not match many states’ sentencing terms for sex crimes, which can reach up to life in prison in some states.<sup>130</sup> Although the state and tribal code are seemingly unfair in comparison, this expansion in sentencing is a great step forward for tribal sovereignty and the protection of AI/AN women. However, still more must be done in this area. As it stands now, VAWA’s protection of victims of “domestic violence” and “dating violence” falls short of its intended goal because it neglects those

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<sup>123</sup> 25 U.S.C. § 1304 (Supp. I 2013) (“A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant —

- i. resides in the Indian country of the participating tribe;
- ii. is employed in the Indian country of the participating tribe; or
- iii. is a spouse, intimate partner, or dating partner of —
  - a. a member of the participating tribe; or
  - b. an Indian who resides in the Indian country of the participating tribe.”).

<sup>124</sup> Ennis, *supra* note 121, at 439.

<sup>125</sup> *Id.*

<sup>126</sup> A tribe must choose to *participate* or “opt-in” for VAWA’s special domestic violence criminal jurisdiction to exist. 25 U.S.C. § 1304, *supra* note 124.

<sup>127</sup> Indian Civil Rights Act, 25 U.S.C. §1302(a)(7)(C).

<sup>128</sup> *Id.* at (a)(7)(D).

<sup>129</sup> *Id.*

<sup>130</sup> Or. Rev. Stat. 137.719 (Oregon statute allowing life sentences for sex crimes); Cal. Pen. Code § 667.61(c) (California penal code allowing life sentences for sex crimes); Ala. Code § 13A-6-61 (Alabama code setting rape as Class A felony, punishable up to a life sentence); *see generally* Fla. Stat. Ann. § 794.011 (Florida statute containing multiple sex crimes carrying potential life sentences).

women falling outside of its scope.<sup>131</sup> Thus, amending VAWA is a necessary and natural next step.

## VI. AMENDING VAWA TO PROTECT ALL AI/AN WOMEN

### A. Adding The “Stranger and Acquaintance Violence” Category to VAWA

VAWA’s current definitions of “dating violence” and “domestic violence” only protect those women currently or formerly involved romantically or intimately with a perpetrator. These definitions leave out a vulnerable group of women, those who do not know their perpetrator. As stated earlier, most incidents of sexual assault or rape committed against an AI/AN woman are committed by non-AI/AN perpetrators.<sup>132</sup> Although it is unknown what the relationships are between all non-AI/AN perpetrators and all AI/AN victims, it is still apparent that the current definitions under VAWA are not as comprehensive as they should be. To begin with, VAWA’s definition of “dating violence” must be critiqued.

The aforementioned definition of “dating violence” provides that the victim must have had “a social relationship of a romantic or intimate nature with the abuser.”<sup>133</sup> To determine if a relationship meets the criteria of VAWA, the length and type of relationship as well as the frequency of interaction between the two parties involved must be considered.<sup>134</sup> However, this definition falls short of fully protecting AI/AN women by placing too much emphasis on determining the nature of the relationship instead of investigating the actual sexual assault or rape.

Having a third party determine if a relationship lasted long enough to constitute “dating violence” under VAWA’s definition seems arbitrary, highly personal, and inherently unfair based on a person-to-person viewpoint. Leaving the interpretation of law to define one’s relationship is dangerous and counterproductive to the criminal prosecution process. The nature of the relationship should

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<sup>131</sup> For example, women being assaulted by strangers or acquaintances.

<sup>132</sup> Chen, *supra* note 11.

<sup>133</sup> 42 U.S.C. § 13925, *supra* note 108, at (a)(11).

<sup>134</sup> *Id.*

not be questioned if there is a victim and a perpetrator — what ultimately matters is bringing that perpetrator to justice.

As the law is currently construed, if a non-AI/AN perpetrator who has sufficient ties to the reservation, be it through employment or residency (but not by marriage, dating or any other regular intimacy with the tribal-member victim),<sup>135</sup> assaults an AI/AN woman, the tribe may only adjudicate the non-AI/AN perpetrator if this individual's relationship with the victim meets the definition of "dating" or "domestic violence."<sup>136</sup> This is very problematic due to the arbitrary line established under the definition of "dating violence." For example, if this same perpetrator were to have gone on a single date with the victim, of whom he drugged and raped, the crime would not be considered "dating violence" under the definition because there was no "social relationship of a romantic or intimate nature with the victim."<sup>137</sup> To counter this, one could say that the date was of a romantic or intimate nature, but then, this would further the notion that the line for "dating" is arbitrary. Arguably, a 30-minute discussion at the bar or even a shared flirtatious-glance may constitute a "romantic or intimate [interaction] with the victim."<sup>138</sup> Under the current definition, however, it seems doubtful that an assault following such a brief encounter would amount to the level required to meet "dating violence" under VAWA.

The issues with coverage under the "dating violence" definition do not seem to apply the same to the "domestic violence" definition. Under VAWA, "domestic violence" is defined as any "felony or misdemeanor of violence committed by a current or former spouse or intimate partner of the victim," or a cohabitating or former cohabitating partner.<sup>139</sup> The definition for "domestic violence" is far more narrowly tailored than the "dating violence" definition and is clear as to what relationships it covers. It would be nearly impossible to say that any instance of violence by a "stranger" or "acquaintance" could meet the "domestic violence" definition due to its requirement of intimacy or cohabitation of partners, and

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<sup>135</sup> 25 U.S.C. § 1304, *supra* note 124.

<sup>136</sup> *Id.* A tribe can adjudicate non-AI/AN attackers through their "special domestic violence criminal jurisdiction.

<sup>137</sup> *Id.* As of 2015, no case law exists on these determinations.

<sup>138</sup> *Id.*

<sup>139</sup> VAWA 2013, *supra* note 20.

therefore, an amendment is necessary to cover those who do not meet this requirement.

In order to amend VAWA to properly protect all AI/AN women whose tribes have opted-in to the act, a proposed third definition for “stranger and acquaintance violence” must be added alongside “domestic violence” and “dating violence.” Both the “domestic” and “dating violence” categories offer important coverage for women being abused by their partners. However, it is essential that AI/AN women have recourse for abuse against them by non-AI/AN strangers or acquaintances within their tribal communities’ jurisdiction. The language under the “stranger and acquaintance violence” could be as follows:

The term “stranger and acquaintance violence” means violence committed within the exterior boundaries of the reservation by a non-Indian person

- (A) Who has or had an ongoing social, work, or other related relationship with the victim; or
- (B) Who is or has engaged in a brief romantic or non-romantic social encounter with the victim; or
- (C) Who has no current or past relationship with the victim.

The “stranger and acquaintance violence” section would cover all those individuals who do not meet the criteria under the “dating” and “domestic” violence categories. Section A would cover abusers associated with the victim through an ongoing working or social relationship. Section B would address brief social encounters, including dates or other one-time social outings resulting in abuse. Lastly, section C would address any abusers completely unknown to the victim. These three categories under this “stranger and acquaintance violence” section would successfully cover all categories of violence against women committed by non-AI/AN individuals within the exterior boundaries of the reservation. This amendment to VAWA is necessary in order for the purpose of the act to be realized.



*B. Justifications to the Amendments to VAWA*

The initial purpose of VAWA was to combat the ongoing issues of abuse toward women throughout the United States. As stated in the October 1993 Senate Report from the Office of Joe Biden:

[T]oo often we hear of police who refuse to take a report from a rape victim or who refuse to arrest an abusive husband; too often we hear of prosecutors who offer misdemeanor plea bargains to violent assaults and rapes; too often we hear judges who fail to put men who attack women behind bars.<sup>140</sup>

Unfortunately, what was true in 1993 remains true today. Additionally, the failure to protect victims is exacerbated by the lack of coverage in tribal communities. The lack of coverage is addressed directly by the Obama Administration's Statement of Administration Policy in response to the 2013 reauthorization of VAWA:

The House bill also would inhibit the successful prosecution by tribal authorities of non-[AI/AN] perpetrators of domestic violence. The proposal currently drafted would continue to allow disparate treatment of [AI/AN] and non-[AI/AN] offenders and fails to adequately address serious criminal violations [in] [t]ribal communities.<sup>141</sup>

Although the Obama Administration's statement mostly focuses on domestic violence in Indian Country, excerpts throughout the statement show a disappointment in the handling of sexual assault in the United States in general.<sup>142</sup> Both the initial Senate Report

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<sup>140</sup> *Turning the Act*, *supra* note 107.

<sup>141</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, S.47 – VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT (2013) [hereinafter Executive Statement].

<sup>142</sup> *Id.* ("The House bill also would inhibit the successful prosecution by tribal authorities of non-[AI/AN] perpetrators of domestic violence. The proposal as currently drafted would continue to allow for disparate treatment of [AI/AN]

from the Office of Joe Biden as well as the Obama Administration's Statement of Administration Policy lay out the policy fundamentals of VAWA, which demand this proposed amendment.<sup>143</sup>

As stated earlier in Joe Biden's Senate Report, too many perpetrators go unpunished for the sexual violence committed against women.<sup>144</sup> Additionally, based on the Obama Administration's analysis, the current state of VAWA still allows for the "disparate treatment" of those in Indian Country and there is still more to be done to fully protect AI/AN women.<sup>145</sup> Although the Obama Administration's statement does not explicitly address violence committed against those not known to the victim, the "stranger and acquaintance violence" amendment would be a step in the right direction toward furthering VAWA's original purpose.<sup>146</sup> The "stranger or acquaintance violence" amendment would combat the poor treatment of AI/AN women committed by those non-AI/AN perpetrators who do not fall under the current categories covered by VAWA.<sup>147</sup> This amendment is a necessary and natural extension of VAWA that would greatly benefit AI/AN women and their communities as a whole in the fight to eliminate sexual violence and end the legacy of colonialism still tainting the AI/AN world to this day.

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and non-[AI/AN] offenders and fails to adequately address serious criminal violations of domestic violence in Tribal communities. The Administration urges the House to adopt the Senate language recognizing Tribal criminal jurisdiction in domestic violence cases. The Administration is disappointed that the House bill does not require covered housing programs to implement emergency transfer plans for victims of domestic violence and sexual assault and does not explicitly protect LGBT victims of crime from discrimination when they seek services or protections funded by VAWA. Unfortunately, the House measure also does not reauthorize the Trafficking Victims Protection Act, which provides critical protections and services for victims of modern day slavery.").

<sup>143</sup> *Id.* The Statement of Administration Policy states that it is one of our duties as a nation to combat the violence against women; *Turning the Act*, *supra* note 107, at ii ("We must stop blaming the victim for her assault – focusing on her behavior instead of her attacker's. We must stop discounting violence that occurs between people who know each other. We must change our justice system's response to violence that occurs when a man terrorizes a woman – whether a stranger or someone he is supposed to love. More than any other factor, the attitude of our society that this violence is not serious stands in the way of reducing this violence. This attitude must change.").

<sup>144</sup> *Turning the Act*, *supra* note 107.

<sup>145</sup> Executive Statement, *supra* note 141.

<sup>146</sup> *Turning the Act*, *supra* note 106.

<sup>147</sup> VAWA 2013, *supra* note 20.

VAWA, by its own declaration, seeks to encourage women to report the crimes committed against them in order to properly prosecute sex offenders in the United States.<sup>148</sup> This call for justice is encouraging, but it also demands that lawmakers hold up their end of the bargain and amend VAWA to fully protect women and not leave them to silence themselves for fear of humiliation and failure to prosecute.<sup>149</sup> By its own accord, VAWA should be protecting AI/AN women who are attacked by non-AI/AN perpetrators without being limited to the definitions of “dating” and “domestic” violence. Therefore, the “acquaintance and stranger violence” amendment is a proper and necessary next step for VAWA’s purpose to be fully realized.

## VII. CONCLUSION

The disparate impact of violence against AI/AN women can no longer be ignored. This “epidemic,”<sup>150</sup> which has fallen on deaf ears, persists at an intolerable rate in Indian Country, and it must be remedied by further protections. VAWA was passed in 1994 and reauthorized in 2013 to protect AI/AN women against non-AI/AN perpetrators on the reservation; however, VAWA’s protections only apply in select circumstances.<sup>151</sup> Under the act’s definition, “domestic violence” and “dating violence” are currently the only protections prescribed to women who meet the requirements of the two categories.<sup>152</sup> These protections are very limited in their scope and create an arbitrary line requiring some sort of prior or current intimate or romantic relationship between the victim and the perpetrator, yet this leaves victims who do not meet this criteria without any recourse in tribal courts.<sup>153</sup>

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<sup>148</sup> VAWA and Privacy, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/privacy/dv/vawa.html> (“to encourage victims of sexual assault and domestic violence to feel secure in seeking counseling, to make full and honest disclosures to their counselors, and to receive the maximum psychological and therapeutic benefit from counseling which will assist them in their personal recovery and result in the prosecution of these crimes”).

<sup>149</sup> Futures Without Violence, *supra* note 22.

<sup>150</sup> Horwitz, *supra* note 6.

<sup>151</sup> VAWA 2013, *supra* note 20.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

The main purpose of this article is to argue for the inclusion of the “stranger and acquaintance violence” category, which would help eliminate the issue of limited legal protection for AI/AN women. It would expand tribal jurisdiction to include those not covered under “domestic” or “dating violence,” being parties: 1) with an ongoing social or work relationship, 2) engaged in a brief romantic or non-romantic engagement, and 3) with no current or previous relationship between them.<sup>154</sup> This proposal will match the original intent of VAWA to protect all AI/AN women from violent crimes by not excluding AI/AN women who do not have an ongoing romantic “domestic” or “dating” relationship with their perpetrator.<sup>155</sup> Additionally, this amendment will address the issue of the disparity in the impacts of violence on AI/AN women recognized in the Obama Administration’s Statement of Administration Policy.<sup>156</sup>

The “stranger and acquaintance violence” amendment to VAWA is not only a large step forward for women’s rights, but also a powerful push towards eradicating the legacy of colonialism in the United States. The rape and abuse of AI/AN women is rooted in this nation’s history of colonialism<sup>157</sup> – a history of shame that we should never forget, but recognize as a pattern of repugnant behavior that must be extinguished.

Further, strengthening VAWA is a great push for tribal sovereignty, and the tribes’ ability to punish those who have wronged their people. By bolstering VAWA, the suppressive power of the holding in *Oliphant* will continue to be diminished and hopefully lead to the case being overruled.<sup>158</sup> Our history of complacency and denial of this violence must not tarnish our legacy of freedom, and we should grip this opportunity to quash it where it stands.

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<sup>154</sup> *Id.*

<sup>155</sup> *Turning the Act*, *supra* note 106.

<sup>156</sup> Executive Statement, *supra* note 141.

<sup>157</sup> Chen, *supra* note 11.

<sup>158</sup> *Oliphant*, *supra* note 80.